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James P. Walker

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NOTES

TENDER OFFER DEFENSIVE TACTICS— FEDERAL REGULATION OF MANAGEMENT'S PREROGATIVE

I. Introduction

Tender offers¹ have become an increasingly commonplace method of acquiring control of a corporation.² A tender offer can be made either with or without the approval of a target³ corporation's management.⁴ If the offer is an "unfriendly" one, its success may depend

1. Conventionally a "tender offer" has been defined as a "publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price. The consideration paid for the shares is in cash or securities and usually represents a premium over market price." Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1250 (1973). In 1979, the SEC proposed a definition of tender offers which expands the conventional meaning of the term. See Exchange Act Release No. 16,385 (Dec. 6, 1979), 44 Fed. Reg. 70,349. The courts and the SEC have defined the scope of the term on a case by case basis. See Note, *Defining Tender Offers: Resolving a Decade of Dilemma*, 54 ST. JOHN'S L. REV. 520, 522 (1980). The ALI-proposed Federal Securities Code defines a tender offer as "an offer to buy or solicitation of an offer to sell, a security that is directed to more than 35 persons, unless the offer is incidental to the execution of a buy order by a broker or to a purchase by a dealer (performing no more than the usual broker-dealer functions) or unless the communication does no more than state an intention to make such an offer or solicitation." ALI Proposed Code Sec. § 299.68. See W. PAINTER, *THE FEDERAL SECURITIES CODE AND CORPORATE DISCLOSURE* § 10.03, at 391 (1979).

2. A corporation making a tender offer is usually seeking to gain control and not seeking merely to become an investor in the offeree company. The successful completion of a tender offer is usually followed by a proposal to merge the acquired company into the offeror. Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 318 (1967) [hereinafter cited as Fleischer & Mundheim]. The tender offer technique may be a less complicated and less expensive method of acquiring control than the traditional proxy contest method. *Id.* at 321. Uncontested tender offers are usually cheaper than an outright sale of the company or a merger because the acquiring company need not buy all the shares of the "target" to gain control. *Id.* at 318. See generally D. AUSTIN & J. FISHMAN, *CORPORATIONS IN CONFLICT—THE TENDER OFFER* (1970).

3. "Target" refers to the company whose shares are the subject of the tender offer.

4. If the management of the target company is opposed to the acquisition, the bid for control may become much more expensive. "Management is not simply a disgruntled shareholder attempting to upset a merger; it has the resources of the corporation at its disposal to defend what it will characterize as existing corporate policy." Fleischer & Mundheim, *supra* note 2, at 321.

largely on whether the target's management actively opposes the bid for control.⁵

5. There are a variety of defensive strategies that management may employ during a tender offer to fend off an unfriendly takeover attempt. Some commonly used tactics which a target company's management may employ include:

(1) Repurchasing of its own shares. This strategy is used to reduce the number of available outstanding shares that the offeror can obtain. It also can be used to drive up the price of shares by making it appear that there is a great demand for the shares. *See* Nathan & Sobel, *Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids*, 35 BUS. LAW. 1545 (1980); *see, e.g.*, Klaus v. Hi-Shear Corp., 528 F.2d 787 (9th Cir. 1975); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1981); Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964).

(2) Enlisting the aid of a "white knight." The target may reach an agreement with a third party, who is considered "friendlier" to present management, in an attempt to defeat a takeover bid. The agreement often obligates the target to make certain concessions to this white knight including one or more of the following: (a) sell treasury or unissued shares to the white knight to make it more difficult for the unsolicited tender offeror to purchase a controlling number of shares. *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Northwest Indus., Inc. v. B. F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969); Condec Corp. v. The Lunkenheimer Co., 230 A.2d 769 (Del. Ch. 1967); (b) offer the white knight an opportunity to buy important assets or a portion of the business of the target to make the target a less attractive acquisition. *See, e.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Whittaker Corp. v. Edgar, No. 82-C-443 slip op., (N.D. Ill. Feb. 25, 1982), *aff'd*, Nos. 82-1305, 82-1307 (7th Cir. Mar. 5, 1982) (mem.); and (c) agree to merge with the white knight to completely frustrate the possibility of an unfriendly takeover. *See, e.g.*, Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418 (1972).

(3) Increasing dividends. Such increases discourage shareholders from tendering by increasing the value of the stock. *See, e.g.*, Klaus v. Hi-Shear, 528 F.2d 225 (9th Cir. 1975); Humana, Inc. v. American Medicorp, Inc., 445 F. Supp. 613 (S.D.N.Y. 1977).

(4) Creating incompatibility between the target and offeror. This tactic usually consists of an acquisition by the target designed to create antitrust problems for any merger plans the offeror may have. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981); Altman v. Knight, 431 F. Supp. 309 (S.D.N.Y. 1977); Anaconda Co. v. Crane Co., 411 F. Supp. 1210 (S.D.N.Y. 1975); Northwest Indus., Inc. v. B. F. Goodrich Co., 301 F. Supp. 706 (N. D. Ill. 1969).

(5) Instituting litigation. Litigation is encountered frequently in an unfriendly tender offer. E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 266 (1973) [hereinafter cited as ARANOW & EINHORN]. It usually is aimed at finding some statutory violation in the offer or its consummation. Occasionally, it apparently is used to buy time for the target. *See, e.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981). *See generally* Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433 (1977).

(6) Publicizing possible adverse effects. This tactic is aimed at discouraging shareholders from tendering by highlighting the potential problems which may ensue from the takeover or by asserting the inadequacy of the bid. *See, e.g.*, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973); Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980), *cert. denied*, 449 U.S. 951 (1981); Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973). This list is not meant to be exhaustive. *See generally* ARANOW & EINHORN, *supra* at 234; A. FLEISCHER, *TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING* ch.

Management has a general duty to determine whether the tender offer is in the best interests of the corporation and its shareholders.⁶ Although a number of courts have held that management must actively oppose an offer not in the best interests of the corporation or shareholders,⁷ a defensive response by management is fraught with conflicts of interest. The target's management may have made a good faith determination that the offer is not in the best interests of the corporation or its shareholders,⁸ but the inherently self-serving nature of management's use of defensive tactics makes its underlying motive suspect.⁹ In addition, while ostensibly employed in the best interests of the shareholders, a defensive strategy may deprive shareholders of the opportunity to realize a profit over the market price of the security by tendering.

Shareholders and acquiring companies seeking to attack the use of defensive tactics during a tender offer may proceed under either state corporation laws¹⁰ or federal securities laws.¹¹ Under state law, judi-

V (1979). There also are techniques which can be used to discourage a tender offer before it is made. See, e.g., Hochman & Folger, *Deflecting Takeovers: Charter and By-Law Techniques*, 34 BUS. LAW. 537 (1979); E. ARANOW, H. EINHORN, & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-99 (1977).

6. *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310, 1319 (W.D. Mich. 1978). As a general proposition, directors and officers must act in good faith and for the best interests of their corporation and its shareholders. *Pepper v. Litton*, 308 U.S. 295, 306-11 (1939); see generally, 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 838, at 142 (rev. perm. ed. 1975) [hereinafter cited as FLETCHER].

7. In *Northwest Indus., Inc. v. B. F. Goodrich Co.*, 301 F. Supp. 706 (N.D. Ill. 1969), the court stated that management has a duty to resist tender offers which "in its best judgement are detrimental to the company or its stockholders." *Id.* at 712. After arriving at a decision that the offer is not in the best interests of the shareholders or corporation, "the company may take any step not forbidden by law to counter the attempted capture." *Id.* at 713. See also *Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981), cert. denied, 102 S. Ct. 658 (1982); *Treadway Co., Inc. v. Care Corp.*, 638 F.2d 357, 381 (2d Cir. 1980); *Heit v. Baird*, 567 F.2d 1157, 1161 (1st Cir. 1977).

8. When directors act in good faith, they enjoy a presumption of sound business judgement. *Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981), cert. denied, 102 S. Ct. 658 (1982) (applying Delaware law); *Treadway Co., Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980) (applying New Jersey law).

9. *Northwest Indus., Inc. v. B. F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969). See also *Johnson v. Trueblood*, 629 F.2d 287, 292 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981).

10. "The determination of a director's or officer's fiduciary duty to the corporation and its shareholders is generally governed by the law of the state of incorporation. . . ." FLETCHER, *supra* note 3, at 142.

Many states have special takeover statutes in addition to general corporation laws. These statutes are used by target management as a shield against tender offers more often than they are employed by acquiring corporations as a sword to attack the legitimacy of defensive tactics. See Bartell, *State Take-over Laws: A Survey, in the Ninth Annual Institute on Securities Regulation* 339 (1977) (surveying 33 state statutes). For more recently enacted statutes, see IOWA CODE ANN. §§ 502.101-.612 (West Supp.

cial scrutiny of management's action usually is guided by the business judgment rule.¹² The rule may be an inadequate standard with which to review the legitimacy of defensive tactics, however, because of the strong self-interest management has in preserving its position.¹³ Stricter standards have been propounded but have not been adopted uniformly.¹⁴ In contrast, federal securities law has not been interpreted by the Supreme Court to include a fiduciary duty owed by management to shareholders.¹⁵ The Sixth Circuit, however, may have endorsed such an interpretation in *Mobil Corp. v. Marathon Oil Co.*¹⁶ by holding that certain defensive strategies to thwart a tender offer were "manipulative" under the Williams Act.¹⁷

1980); MASS GEN. LAWS ANN. ch. 110c, §§ 1-13 (West Supp. 1980); MO. ANN. STAT. §§ 409.500-.565 (Vernon Supp. 1979); S.C. CODE §§ 35-2-10 to 110 (Law Co-op Supp. 1980). For a recent discussion of the constitutionality of these statutes in light of traditional pre-emption and commerce clause analysis, see McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295 (1981).

11. Claims under federal securities laws usually allege violations of § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979), and § 14(e) of the Williams Act, Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, amending 15 U.S.C. §§ 78m-n (1964), as amended, 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1976).

Section 10(b) states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange—(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1976).

Section 14(e) provides in pertinent part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (1976).

12. See *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759 (3d Cir. 1974). "The sound business judgment rule . . . expresses the unanimous decision of American courts to eschew intervention in corporate decision-making if the judgment of directors and officers [is] uninfluenced by personal considerations and is exercised in good faith." *Id.* at 762 (applying New York law); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) (in absence of fraud or gross overreaching, courts will not interfere with judgment of board of directors). *Id.* at 720. See generally 3A FLETCHER, *supra*, note 5, § 1039 at 41.

13. See notes 137-38 *infra* and accompanying text.

14. See notes 133-36 *infra* and accompanying text.

15. See notes 59-71 *infra* and accompanying text.

16. 669 F.2d 366 (6th Cir. 1981).

17. *Id.* See notes 88-103 *infra* and accompanying text.

This Note first analyzes the meaning of the term “manipulative” under federal securities laws. It then examines the Supreme Court’s rejection of a federal fiduciary standard under § 10(b) of the Securities Exchange Act of 1934 (1934 Act) and the application of this decision to claims against management for opposing a tender offer. This Note rejects the Sixth Circuit’s limited application of a federal standard of conduct to management’s actions during a tender offer as incongruous with Supreme Court precedent, the legislative intent of the federal securities laws, and the usual exercise of deference by the courts when resolution of difficult policy issues is more appropriately addressed by the legislature.

II. Federal Securities Laws

A. The Securities Exchange Act of 1934

The 1934 Act recognized that the securities exchanges could function properly¹⁸ only if buyers and sellers of securities could meet in a free and open market to bargain over value.¹⁹ Accurate appraisal of value, however, necessarily requires that certain information be made available to investors to allow them to make their own informed assessment.²⁰ Thus, the fundamental purpose of the 1934 Act was to ensure adequate disclosure of information in a securities transaction for the benefit of investors.²¹

One of the specific evils to which disclosure is directed is the unfair use of inside information by officers, directors and stockholders for personal gain.²²

18. The primary function of the securities markets is to provide liquidity to the investor. “Liquidity” is a measure of the convertibility of an investment into cash. *See* A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 258 (1967) [hereinafter cited as BERLE & MEANS].

19. *See* S. REP. NO. 1455, 73d Cong., 2d Sess. 30 (1934). “The true function of an exchange is to maintain an open market for securities where supply and demand may freely meet at prices uninfluenced by manipulation and control.”

20. *See* BERLE & MEANS, *supra* note 18, at 259; Moore & Wiseman, *Market Manipulation and the Exchange Act*, 2 U. CHI. L. REV. 46, 48 (1934).

21. The 1934 Act was aimed at “substituting a philosophy of full disclosure for a philosophy of caveat emptor.” *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977). *See* *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972). For a general discussion of the 1934 Act, *see* Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025 (1934) [hereinafter cited as Tracy]; 1 L. LOSS, *SECURITIES REGULATION* 130 (2d ed. 1961).

22. Such abuses by corporate insiders depend upon “superior opportunities for knowing the facts” in order to take advantage of those not on the inside who lack information about the corporate business. *See* Tracy, *supra* note 21, at 1032. Congress expressed its concern about the unfair advantages of using inside information by enacting § 16, 15 U.S.C. § 78(p) (1976), of the 1934 Act. *See generally* 2 L. LOSS, *supra* note 21, at 1037-44; 3 L. LOSS, *supra* note 21, at 1541-60.

Insider abuses are similar in nature to a second type of prohibited practices — “manipulations.”²³ Manipulation, however, concerns market activity rather than the use of inside corporate information. No explicit definition of manipulation is provided in the 1934 Act and, therefore, the scope of the term must be gleaned from a reading of the explicitly prohibited practices set out in the 1934 Act. The key sections of the 1934 Act concerning manipulation are sections 9²⁴ and 10,²⁵ which include two types of provisions.²⁶ The first type empowers the Securities and Exchange Commission (SEC) to issue regulations concerning pegging,²⁷ options,²⁸ short sales and stop-loss orders,²⁹ and manipulative practices not specifically prohibited by the Act.³⁰ The second type expressly prohibits certain practices as market manipulations.³¹ The clear implication of these specific prohibitions³² is that

23. “These abuses do not depend on the use of the stock exchanges, but are similar in character to the abuses of stock exchange devices [manipulations] in the sense that advantage is taken by persons who have superior opportunities for knowing the facts, of lack of information as to the condition of a corporate business, on the part of those not on the “inside.” Tracy, *supra* note 21, at 1032.

24. 15 U.S.C. § 78i (1976).

25. *Id.* § 78j.

26. See Note, *Market Manipulations and the Securities Exchange Act*, 46 YALE L. J. 624, 629 (1937).

27. *Id.* § 78i(a)(6).

28. *Id.* § 78i(b).

29. *Id.* § 78j(a).

30. *Id.* § 78j(b).

31. See Note, *Market Manipulations and the Securities Exchange Act*, 46 YALE L. J. 624, 629 (1937).

32. 15 U.S.C. § 78i(a)(1)-(5) (1976). Section 9 provides in pertinent part:

Sec. 9 (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security, or raising or

the term "manipulation" was intended to apply to those activities occurring within the market itself which intentionally distort the market's appraisal of value.

Because a correct appraisal of value turns on the availability of accurate information, the information which the securities markets themselves provide,³³ must be reliable. The anti-manipulative provisions of the 1934 Act attempt to prevent practices which create misinformation³⁴ concerning the supply and demand in the securities market.³⁵

depressing the price of such security, for the purpose of including the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

33. The two primary sources of information for valuing securities are the issuer and the stock market. The stock market provides information concerning prices, bids and offers, and supply and demand. Corporate information allows shareholders to value their property independently of the market based on factors such as prospective earnings of the corporation. Without corporate information, shareholders would have to value their property based only on supply and demand reflected by the market. Thus, buyers and sellers would be vulnerable to coercion of market forces. G. LASRY, *VALUING COMMON STOCK* 98-104 (1979).

34. Manipulation includes a misrepresentation because the "controlled price quotation . . . does not reflect the interplay of the judgments of bona-fide sellers and buyers." Note, *Market Manipulations and the Securities Exchange Act*, 46 *YALE L. J.* 624, 628 (1937).

35. "Behind the anti-manipulative provisions as a whole was the conviction that manipulation . . . injured the public by . . . interfering with the proper performance of the market function in valuing securities." Note, *Regulation of Stock Market Manipulation*, 56 *YALE L. J.* 509, 521 (1947). "The Act attempts to deal with excessive speculation by those deprived of complete information and with unfair methods of speculation indulged in by those who control the market price." S. REP. No. 792, 73d Cong., 2d Sess. 3-5 (1934).

The failure of Congress to incorporate an explicit definition of manipulation³⁶ into the 1934 Act, however, has forced the courts to fashion their own definitions. One court,³⁷ after analyzing the 1934 Act, concluded that "manipulation" consists of "practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply and demand or tampering with the price itself."³⁸

B. The Williams Act

The 1934 Act was amended in 1968 with the enactment of the Williams Act.³⁹ The Williams Act specifically provides for the full disclosure of pertinent information to stockholders when control of a corporation is sought either by tender offer or through open market or privately negotiated purchases of securities.⁴⁰ Information is important in the context of a tender offer because a successful tender offer

36. Early commentators attempted to define manipulation. See TRACY, *supra* note 21, at 1031. (Manipulation is the artificial raising or lowering of the security's price to make the general public believe that the quoted price is the natural or normal market value of the security or fixed by offers and sales made in the regular course of trade.). "Market manipulation refers to widely varying types of devices used to stimulate or to discourage the buying and selling of securities." Note, *Regulation of Stock Market Manipulation*, 56 YALE L. J. 509, 521 (1947).

37. See *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979). *Hundahl* involved a suit against a majority shareholder who attempted to acquire the remaining 20% of stock it did not own. It employed devices such as using grossly conservative accounting procedures, restrictions on stock dividends and allocation of certain of its own expenses to the corporation. This conduct was obviously aimed at affecting the stock's price; yet, the court did not find a violation of § 10 (b). The court held that the definition of manipulation did not encompass acts occurring outside the marketplace that, absent an intention to manipulate, would amount merely to a claim of fiduciary breach. Although the defendant intended to lower the stock's price and its acts had the intended results, the transactions were not found to be practices which occurred in the marketplace having the effect of artificially lowering the stock's price. The defendant's conduct merely "resulted in the market forming a judgement about the value of [the] stock based on its perception of the wisdom of decisions made by . . . management." A failure to disclose the conduct might have been deception under § 10 (b), but it would not constitute manipulation. *Id.* at 1362.

38. *Id.* at 1360. The court stated that this definition was forged from a study of the common law of manipulation, the language and legislative history of the Securities Exchange Act, and the Supreme Court's recent emphasis in securities law on federalism. *Id.*

39. See note 11 *supra*.

40. It also provided for certain disclosures by a corporation when it repurchases its own stock. See S. REP. NO. 550, 90th Cong., 1st Sess., 1 (1967) [hereinafter cited as SENATE REPORT]; H.R. REP. NO. 1711, 90th Cong., 2d Sess. 1, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811 [hereinafter cited as HOUSE REPORT].

can result in a change of control and, consequently, a change of management for the corporation.⁴¹ Former Senator Harrison A. Williams, co-sponsor of the Williams Act, in presenting the bill for passage, stated that it was "designed solely to require full and fair disclosure for the benefit of investors."⁴² Indeed, his purpose in introducing the bill was to close the gap in securities law where disclosure was not yet required.⁴³

Through the requirement of full disclosure, the legislature contemplated an equilibrium of competing forces in the tender offer contest.⁴⁴ It was emphasized that the Act was not intended to favor any of the parties making or opposing⁴⁵ a tender offer.⁴⁶ Consistent with

41. "Information about a potential change in control can be particularly essential to an informed decision. A change in control brings with it the possibility of different operating results and different investment results, or perhaps the possibility of realizing on a company's liquidation value." See *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings Before the Subcomm. on Securities of the Sen. Comm. on Banking and Currency*, 90th Cong., 1st Sess. 34 (1967) (testimony of Manuel F. Cohen, Chairman of the Securities and Exchange Commission) [hereinafter cited as *Hearings*].

42. 113 CONG. REC. 24,663 (1967).

43. See *Hearings*, *supra* note 41, at 1.

44. See 113 CONG. REC. 854 (1967) (remarks of Senator Williams). "With this legislation, all will stand on equal footing with respect to the availability of significant facts about a tender offer. . . ."

45. Originally, the Williams Act did not require that target management make any response to a tender offer. See ARANOW & EINHORN, *supra* note 5, at 220. Under Rule 14e-2, promulgated by the SEC pursuant to § 14(e), management is now required to make one of three responses. See 17 C.F.R. § 240.14e-2 (1981). Rule 14e-2 provides:

(a) Position of subject company. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company: (1) Recommends acceptance or rejection of the bidder's tender offer; (2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or (3) Is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

(b) Material change. If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish, send or give a statement disclosing such material change to security holders.

A statement of position by the target triggers a requirement for filing a Schedule 14D-9 under rule 14d-9. (Codified at 17 C.F.R. § 240.14d-9 (1981)).

46. A similar bill introduced by Senator Williams in 1965 was motivated primarily by a perception that incumbent management needed protection from the scourge of "corporate raiders." 111 CONG. REC. 28256, 28257 (1965) (remarks of Senator Williams). This bill never progressed beyond discussions between the SEC and market professionals. See 113 CONG. REC. 854 (1967) (remarks of Senator Williams). When

this "policy of neutrality,"⁴⁷ the Act does not extensively regulate defensive tactics. In fact, the only defense tactic explicitly regulated by the Williams Act is the repurchase of securities by an issuer.⁴⁸ Even in this area, the Williams Act emphasizes disclosure rather than outright prohibition.⁴⁹

As with the 1934 Act, the Williams Act amendment to the 1934 Act provides no definition for the term manipulation.⁵⁰ Moreover, there is no indication in the legislative history of the Williams Act that the term was intended to be interpreted any differently under the Williams Act than it had been interpreted under the 1934 Act. As a result, the courts have held that section 14(e) of the Williams Act adopts the meaning of manipulation as that term is interpreted under the section 10(b) of the 1934 Act.⁵¹

III. Judicial Rejection of a Federal Fiduciary Standard

A. Pre-Santa Fe

Federal securities laws impose a regulatory framework requiring adequate disclosure of corporate information which supplements the traditional regulation of corporate activities by state law.⁵² In the

Senator Williams introduced a revised bill in 1967, the emphasis had shifted away from protecting incumbent management and instead attempted to provide full disclosure in a tender offer without "tipping the balance of regulatory burden in favor of management or in favor of the offeror." *Id.*

47. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 29 (1977).

48. Section 13(e) gave the Securities and Exchange Commission the power to promulgate rules with respect to issuer repurchases to prevent fraudulent, deceptive and manipulative practices "in the public interest or for the protection of investors. . . ." 15 U.S.C. § 78m(e)(1) (1976).

49. *See* 15 U.S.C. § 78m(e) (1976). *See also* *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 34 (1977) (interpreting comments made during the Senate Subcommittee's Hearings on the Williams bill concerning unfair tactics of target management as reference to a need for disclosure by target management).

50. *See* 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1976). In a 1970 amendment to § 14(e) of the Act, the SEC was granted the authority to promulgate rules concerning the definition of fraudulent, deceptive, and manipulative practices. *See* 15 U.S.C. § 78n(e) (1976). To date, the SEC has not exercised this authority. *See* 17 C.F.R. §§ 240.14(e)(1)-(3) (1981).

51. *See* note 72 *infra*.

52. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Cort. v. Ash*, 422 U.S. 66, 84 (1974). *See* *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181 (1979) (interpreting § 28(a) of the 1934 Act as evidence of congressional intention to protect, rather than to limit, state authority in enacting the Act). *See also* *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973), which states: "Congress, in the

past, it was held that federal securities law should impose substantive duties upon corporate officers in addition to disclosure obligations.⁵³ Prior to the Supreme Court decision in *Santa Fe Industries, Inc. v. Green*,⁵⁴ a number of lower federal courts had recognized a cause of action under sections 10(b) and 14(e) of the 1934 Act based solely on claims of breach of fiduciary duty in connection with a securities transaction.⁵⁵ The rationale of these cases, when applied to the tender offer context, would subject management's defensive tactics to a fiduciary standard of conduct under federal securities law.

In *Applied Digital Data Systems v. Milgo Electronics*,⁵⁶ for example, it was held that a tender offeror could show that the target's management had violated section 14(e) by demonstrating that the sale of authorized but unissued shares by the target to a "white knight" had no valid business purpose and was designed solely to defeat the tender offer.⁵⁷ Such a broad interpretation of section 10(b) or section 14 (e) was rejected by the Supreme Court in *Sante Fe*.⁵⁸

securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation."

53. In *Drachman v. Harvey*, 453 F.2d 722, 729 (2d Cir. 1971), *rev'd on other grounds on rehearing en banc*, 453 F.2d 736 (2d Cir. 1972), the court stated: [W]e are concerned here with an important enforcement provision of a federal statute [section 10(b) and Rule 10b-5] intended not only to expand the common law but to create new, far-reaching and uniform law of shareholder-management relations in congressionally designated areas of substantive corporation law . . ."; *accord McClure v. Borne Chem. Co.*, 292 F.2d 824, 834 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961). *See also* Fleischer, "Federal Corporation Law": An Assessment, 78 HARV. L. REV. 1146 (1965) [hereinafter cited as Fleischer]; Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27, 30-32 (1973); Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991 (1976).

54. 430 U.S. 462 (1977).

55. *See* *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277, 1281 (2d Cir. 1976), *vacated*, 429 U.S. 881 (1977); *Applied Digital Data Sys. v. Milgo Electronics Corp.*, 425 F. Supp. 1145 (S.D.N.Y. 1977); *Parker v. Baltimore Paint and Chem. Corp.*, 244 F. Supp. 267, 270 (D. Colo. 1965). In addition, a number of cases have suggested that a breach of fiduciary duty through self-dealing by insiders could constitute "fraud" as prohibited by § 10(b) and Rule 10b-5. *See* *Schoenbaum v. Firstbrook*, 405 F.2d 215, 219-20 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969) (controlling shareholder forced corporation to sell stock for inadequate consideration); *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 270 (7th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967) (corporation defrauded by sale of stock at inadequate price even though all corporate directors agreed to sale). *See generally* Comment, *Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law*, 55 VA. L. REV. 1103 (1969).

56. 425 F. Supp. 1145 (S.D.N.Y. 1977).

57. Although the court held that the complaint of the offeror would be actionable because the common law tort principles of interference with a prospective advantage had been incorporated into § 14(e), it also found that under § 14(e) the target management owed a fiduciary duty to their shareholders. *Id.* at 1156, 1158.

58. *See* Note, *Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green*, 91 HARV. L. REV. 1874 (1978) (discussing what constitutes

B. *Santa Fe Industries, Inc. v. Green*

Santa Fe involved a parent company which had acquired from minority shareholders the remaining five percent of its subsidiary's stock pursuant to a short-form merger under a Delaware statute.⁵⁹ One minority shareholder elected not to pursue an appraisal in state court⁶⁰ and instead brought an action in federal court under Rule 10b-5 of the 1934 Act⁶¹ based on two grounds: first, that the merger lacked a valid business purpose and was executed without prior notice to minority shareholders; and second, that the gross undervaluation of the shares constituted fraud.⁶² The Court noted that the terms "artifice to defraud" and "fraud or deceit" in Rule 10b-5 meant something more than mere breach of fiduciary duty;⁶³ the conduct must be "fairly viewed" as "manipulative" or "deceptive" within the meaning of section 10(b)⁶⁴ to state a cause of action under Rule 10b-5. It held that the allegations failed to state a claim of "deception" because the complaint "failed to allege a material misrepresentation or material failure to disclose."⁶⁵ The Court also found that the allegations were insufficient to state a claim of "manipulation"⁶⁶ because Congress had not intended to bring within the scope of section 10(b)'s definition of manipulation those instances of corporate mismanagement in which the essence of the complaint was that management had breached its fiduciary duty to shareholders.⁶⁷ It was noted that "manipulation

deception and what causal connection such deception must bear to the harm alleged under Rule 10b-5 after *Santa Fe*).

59. 430 U.S. at 465. DEL. CODE ANN. tit. 13 § 253 (1974). Section 253 permits a parent corporation owning at least 90% of the stock of a subsidiary to merge with that subsidiary, upon approval by the parent's board of directors, and to make payment in cash for the shares of the minority stockholders.

60. The parent paid the minority shareholders \$150 for each of their shares despite the fact that an independent appraisal of the subsidiary's assets indicated a \$640 value per share. Under state law shareholders were forced to sell but could seek court appraisal of share value if not satisfied with the price paid. 430 U.S. at 466-67.

61. 17 C.F.R. § 240.10b-5 (1981).

62. *Id.* at 467.

63. *Id.* at 471-72. The Court stated that in construing the scope of fraud under Rule 10b-5, the statutory language of § 10(b) must be the "starting point." *Id.* at 472 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)).

64. 430 U.S. at 473-74.

65. *Id.* at 474. The failure of the majority shareholder to give notice of the merger was not a material nondisclosure because such notice was not required under state law and, even if it had been given, the minority shareholders would not have been able to enjoin the merger under state law.

66. *Id.* at 476.

67. *Id.* at 477.

refers generally to practices . . . that are intended to mislead investors by artificially affecting market activity.”⁶⁸

The decisions after *Santa Fe* have been characterized by confusion over the scope to be given to the terms “deceptive”⁶⁹ and “manipulative,”⁷⁰ terms the interpretation of which becomes crucial to identifying a cause of action. It is clear, however, that claims under section 10(b) will no longer be sufficient merely because they allege some unfairness in connection with a securities transaction.⁷¹

C. Decisions after *Santa Fe*

In the tender offer context, courts have noted the similarity between sections 10(b) and 14(e) and have applied the rationale of *Santa Fe* to actions against management for its use of defensive tactics.⁷²

68. *Id.* at 476. The Court made specific reference to § 9 of the 1934 Act, 15 U.S.C. § 78i. *See* note 24 *supra*. As an alternative basis for its holding, the Court relied on two factors to demonstrate that Congress had not intended to create a federal cause of action for mere breach of corporate fiduciary duty under § 10(b). First, the fact that this type of action is one “traditionally relegated to state law” was considered significant. *Id.* at 478 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 40 (1977)). Secondly, the Court stated that implying such a cause of action was unnecessary to the fundamental purpose of “full disclosure” underlying the 1934 Act. 430 U.S. at 477-78.

69. A number of decisions have limited *Santa Fe* significantly by expanding the materiality element of a deception offense. *See* *Healey v. Catalyst Recovery of Pa., Inc.*, 616 F.2d 641 (3d Cir. 1980); *Alabama Farm Bureau Mut. Casualty Co. v. American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979), *cert. denied*, 449 U.S. 820 (1980); *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Wright v. Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See generally* Comment, *Santa Fe Industries v. Green Revisited: A Critique of Circuit Court Application of Rule 10b-5 to Breaches of Fiduciary Duty to Minority Shareholders*, 28 U.C.L.A.L. REV. 564 (1981). These cases “boot-strap” the mismanagement claim into federal court by alleging that information which may have indicated a breach of fiduciary duty under state law was not adequately disclosed. *See* Note, *Securities Regulation—Liability for Corporate Mismanagement Under Rule 10b-5 after Santa Fe v. Green*, 27 WAYNE L. REV. 269, 288 (1980).

70. *See* discussion of *Mobil Corp. v. Marathon Oil Co.*, notes 88-103 *infra* and accompanying text. *See also* *Joseph E. Seagram & Sons, Inc. v. Abrams*, 510 F. Supp. 860, 862 (S.D.N.Y. 1981) (temporary restraining order issued until hearing could determine whether opposition to tender offer was manipulative practice under § 14(e) because it was without business justification).

71. “[O]nce full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute.” 430 U.S. at 478.

72. *See* *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), (Section 10(b) concerns the sale and purchase of securities, but its anti-manipulative language is similar to that of section 14(e)); *see also* *Panter v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 687 (1982); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1366 (N.D. Tex. 1979); ARANOW & EINHORN, *supra* note 5, at 116.

Santa Fe appears to offer a safe harbor from federal securities regulations for target management's use of defensive tactics so long as those tactics are neither "deceptive" nor "manipulative" under sections 10(b) or 14(e). The cases after *Santa Fe* dealing with allegations against management for opposing a tender offer affirm this conclusion.⁷³

In *Panter v. Marshall Field & Co.*,⁷⁴ the Seventh Circuit held that the directors of a corporation were not liable under federal securities law even though their decision to oppose a tender offer deprived shareholders of the opportunity to tender their shares.⁷⁵ The tender offeror decided to withdraw its offer after the directors of the target rejected a merger proposal from the offeror and announced a plan to proceed with an expansion program.⁷⁶ The court found no violation of section 14(e) because the tender offer had never become effective.⁷⁷ It also decided that no deception or manipulation under section 10(b) resulted from management's use of acquisitions and litigation to thwart the tender offer.⁷⁸

Other decisions, relying on *Santa Fe*, have implicitly found that various defensive tactics employed by target companies are not manipulative. In *Altman v. Knight*,⁷⁹ for example, it was argued that directors of the target violated section 14(e) by acquiring another company solely to defeat a tender offer.⁸⁰ The court held that the claim essentially alleged a breach of fiduciary duty⁸¹ and, as such, was precisely the kind of claim that *Santa Fe* determined should be decided under state law.⁸² A shareholder alleged in *Berman v. Gerber Products Co.*,⁸³ that Gerber's management had violated section 14(e)

73. See notes 74-85 *infra* and accompanying text.

74. 646 F.2d 271 (7th Cir. 1980).

75. *Id.* at 299.

76. *Id.* at 280-81.

77. The tender offer was withdrawn before shareholders had the opportunity to tender; therefore, they could not have relied on any deception. *Id.* at 283; accord *Lewis v. McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980).

78. 646 F.2d at 293.

79. 431 F. Supp. 309 (S.D.N.Y. 1977).

80. The plaintiff also alleged violations under § 10(b) of the Act and under state law.

81. By finding no claim consistent with *Santa Fe*'s requirements, the court implicitly found no manipulation in management's actions.

82. 431 F. Supp. at 314. The court held that the alleged misstatements were not causally related to any harm because the transaction did not require shareholder approval and thus dismissed the federal claims. It refused to retain jurisdiction over the state claims.

83. 454 F. Supp. 1310 (W.D. Mich. 1978).

by its active opposition to a tender offer,⁸⁴ including litigation against the offeror. The court decided that the claims were not cognizable under federal securities laws after *Santa Fe*.⁸⁵ In so holding, the court implicitly determined that the tactics used by management to deter the offer were not manipulative.

Thus, a majority of cases after *Santa Fe* agree that when adequate disclosure has been made and investors have not been misled, no action will lie under section 14(e) for the use of defensive tactics during a tender offer.⁸⁶ A recent decision by the Sixth Circuit,⁸⁷ however, threatens to undermine the established application of *Santa Fe* to mismanagement in a securities transaction by expanding the meaning of manipulation in the context of a tender offer.

D. *Mobil Corp. v. Marathon Oil Co.*

In *Mobil*, the Sixth Circuit reviewed allegations by a tender offeror that the target had engaged in certain "manipulative" practices in violation of section 14(e). Responding to an unfriendly tender offer by Mobil,⁸⁸ the management of the target, Marathon, signed a merger agreement with a "white knight", U.S.S. Corporation (USS), a wholly owned subsidiary of United States Steel Corporation (U.S. Steel).⁸⁹

84. The plaintiffs' complaint contained allegations of various § 14(e) violations concerning material misrepresentations or omissions and fraudulent, deceptive and manipulative practices. *Id.* at 1317.

85. *Id.* at 1318. Allegations of mismanagement absent the element of deception do not state a claim under § 14(e).

86. *Panther v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 687 (1982); *Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.), *cert denied*, 449 U.S. 551 (1980); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978); *A&K R.R. Materials, Inc. v. Green Bay & W. R.R. Co.*, 437 F. Supp. 636, 642 (E.D. Wis. 1977); *Altman v. Knight*, 431 F. Supp. 309, 313 (S.D.N.Y. 1977). *But see* discussion of *Mobil Corp. v. Marathon Oil Co.*, notes 88-103 *infra* and accompanying text; *Joseph E. Seagram & Sons, Inc. v. Abrams*, 510 F. Supp. 860, 861-62 (S.D.N.Y. 1981) (temporary restraining order issued until hearing could determine whether target management had used manipulative practices in violation of § 14(e) by opposing tender offer without business judgment justification).

87. *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981).

88. Mobil made a cash tender offer at \$85 a share for up to 40 million shares of Marathon stock conditioned on the receipt of at least one-half of the outstanding shares. Mobil announced its intention to acquire the balance by merger if the offering was successful. Marathon directors, concerned about possible antitrust violations which the proposed merger might cause, immediately filed an antitrust action against Mobil's bid to take over Marathon as a violation of § 7 of the Clayton Act. 15 U.S.C. § 18 (1976 & Supp. IV 1980). Marathon won its request for a preliminary injunction. *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315 (N.D. Ohio 1981), *aff'd*, 669 F.2d 378 (6th Cir. 1981).

89. Pursuant to the agreement, U.S. Steel made its own tender offer at \$125 a share for 30 million shares. 669 F.2d at 367.

The agreement contained two crucial conditions: first, Marathon was required to give U.S.S. an irrevocable option to purchase ten million authorized but unissued shares of Marathon (approximately 17% of outstanding Marathon shares) at \$125 a share; and second, Marathon was required to give U.S.S. an option to purchase Marathon's interest in certain oil and mineral rights (Yates Field), exercisable only in the event that U.S. Steel failed in its tender bid and another bidder gained control of Marathon.⁹⁰ Mobil sought a preliminary injunction to prohibit the exercise of this option agreement, alleging that the options were manipulative practices under section 14(e) because they acted as a "lock-up"⁹¹ arrangement, the sole purpose of which was to defeat competitive tender offers.⁹² The district court denied Mobil's request for preliminary injunctive relief,⁹³ holding that Mobil's claim that the options were manipulative under section 14(e) amounted to nothing more than a claim of breach of fiduciary duty.⁹⁴

The Sixth Circuit reversed,⁹⁵ holding that the options were individually and in combination "manipulative" under section 14(e).⁹⁶ The

90. *Id.* at 367.

91. A lock-up arrangement is a relatively new type of defensive tactic. It "gives the proposed acquirer (the 'bidder') an advantage in acquiring the target over other bidders or potential bidders." Fraidin & Franco, *Lock-up Arrangements*, REV. SEC. REG. Vol. 14, at 821 (Nov. 4, 1981) (discussing the mechanics and legality of lock-up arrangements)[hereinafter cited as Fraidin & Franco].

92. *Id.* at 368. Mobil also alleged that Marathon had failed to disclose material information regarding the purpose of the options, also in violation of § 14(e). In addition, Mobil claimed that Marathon directors had breached their fiduciary duties under state law, had violated Ohio Rev. Code § 1701.76 by selling all or substantially all of its assets without shareholder approval and had conducted transactions which had no legitimate corporate purpose. *Id.*

93. The district court judge denied the preliminary injunction stating that although three elements of the test enunciated in *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977), to consider whether a preliminary injunction should issue were satisfied, the fourth element, whether plaintiff has shown a strong or substantial likelihood or probability of success on the merits, was not met. 669 F.2d at 369.

94. The district court judge rejected the other claims as well. *Id.* at 369.

95. *Id.* at 374. The first part of the court of appeals' opinion addressed the question of whether Mobil as a tender offeror had standing to sue for an injunction under § 14(e) of the Williams Act. In *Piper v. Chris-Craft*, the Court decided that a tender offeror did not have a private cause of action for damages against either the target corporation or a successful bidder under § 14(e). The Court left open the possibility that a tender offeror could assert standing for injunctive relief. *Id.* at 42. The *Mobil* court decided that the offeror should have standing to seek injunctive relief in a representative capacity for Marathon's shareholders. 669 F.2d at 373. Other courts also have recognized a tender offeror's right to assert standing for injunctive relief after *Piper*. See *Weeks Dredging & Contracting, Inc. v. American Dredging Co.*, 451 F. Supp. 468 (E.D. Pa. 1978); *Humana, Inc. v. American Medicorp, Inc.*, 445 F. Supp. 613 (S.D.N.Y. 1977).

96. *Id.*

court defined manipulation as conduct affecting the price of securities "by artificial means, i.e., means unrelated to the natural forces of supply and demand."⁹⁷ The court considered the Yates Field option manipulative because, if given effect, it would have created an "artificial ceiling" in the price of Marathon stock.⁹⁸ Such a ceiling on the price of shares could be expected because the Yates Field appeared to be the principal asset of Marathon.⁹⁹ A successful tender offer for control by any bidder other than U.S.S. would amount to a Pyrrhic victory because it would allow U.S.S. to exercise its option to buy the Yates Field.¹⁰⁰ Thus, no bidder would be able to compete with the U.S.S. offer of \$125 a share. The stock option also was considered manipulative by the court because the size of the purchase would "serve as an artificial and significant deterrent to competitive bidding for a controlling block of Marathon shares."¹⁰¹ The court found that the exercise of this option would make a competing offer significantly more expensive than a comparable tender offer by U.S.S.¹⁰²

Implicit in the court's use of the term "artificial" to describe Marathon management's tactics is a judgment that these management actions served no legitimate corporate purpose. Although virtually any management action can influence the demand for a corporate security, the court in *Mobil* found that the effect of granting lock-up options during a tender offer was "unrelated to the natural forces of supply and demand."¹⁰³ The court apparently relied on the broad policy of investor protection under the Williams Act¹⁰⁴ to argue that the heretofore state law principles of management discretion are su-

97. *Id.*

98. *Id.* at 375.

99. Marathon referred to the Yates field as its "crown jewel." *Id.* at 367.

100. If any other bidder did offer more than \$125 a share and won control of Marathon, U.S. Steel could have exercised the option, leaving the successful bidder with control over the remaining assets and cash from the sale of Yates Field. Although the lower court determined that the sale price was fair, the court of appeals noted evidence that the Yates Field might be worth considerably more to some bidders. Without it, a takeover of Marathon did not appear to be as attractive. *Id.* at 375.

101. *Id.*

102. The court accepted Mobil's contention that because of the option giving U.S. Steel 10 million Marathon shares at \$90 per share while the current market price was \$125, any increase in the offer price would cost U.S. Steel \$30 million per dollar increase while such dollar increase would cost any other bidder \$47 million. *Id.* at 375-76.

103. *Id.* at 374.

104. "The legislative history thus shows that Congress was intent upon regulating takeover bidders . . . in order to protect the shareholders of the target companies." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 28 (1977).

perceded by federal securities laws during a tender offer,¹⁰⁵ and management decisions made during this period that interfere with competitive bidding will be considered "artificial" and "manipulative" because they are not in the best interests of shareholders.

The *Mobil* decision could have a significant impact on tender offer contests by subjecting internal management decisions to a federal fiduciary standard under the guise of federal securities regulation.¹⁰⁶ Under the *Mobil* approach, lock-up options and possibly any defensive strategy that is an "artificial and significant deterrent to competitive bidding" or which creates an artificial ceiling on the price of a share, could be considered manipulative under section 14(e).

IV. Rejecting the *Mobil* Approach

A. Infidelity to *Santa Fe*

In *Santa Fe*, the Supreme Court held that one element of a manipulative practice is its artificial effect on market activity.¹⁰⁷ Even assuming for the moment that the meaning of artificial is clear, the *Mobil* court chose to ignore another explicit element under the Supreme Court's analysis: the intention to "deceive"¹⁰⁸ or "mislead"¹⁰⁹ investors. By declining to disturb the district court's finding that Marathon had fully complied with all disclosure requirements,¹¹⁰ the court of appeals had to rely solely on the allegedly artificial effect of management's tactics.

The *Mobil* court cited *Santa Fe* for the proposition that the term manipulative must remain flexible enough to include new techniques developed to artificially affect securities markets.¹¹¹ Under the 1934 Act, conduct outside the market that influences the market is not considered artificial within the meaning of manipulation.¹¹² *Santa Fe* took judicial notice that the term manipulative had become a "term of art" and, as a consequence, had developed a limited meaning when

105. See Hockman, *A Hostile Tender Offer: Does it Suspend the Rules?*, NAT'L L. J. 25, 27 (Mar. 29, 1982).

106. See text accompanying note 130 *infra*. This standard is all the more cumbersome because it judges management's actions during a tender offer by the effect they have on shareholders indirectly through the effect on potential bidders.

107. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

108. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

109. 430 U.S. at 476.

110. 669 F.2d at 376-77. Marathon's management made no secret of its intention to block unfriendly bidders. See testimony of H. Hoopman, President of Marathon, *id.* at 376.

111. 669 F.2d at 376, *citing*, *Santa Fe Indus., Inc. v. Green*, 430 U.S. at 477.

112. See notes 37-38 *supra* and accompanying text.

used in connection with the securities markets.¹¹³ Congress would not have used a term with such established meaning "if it had meant to bring within the scope of section 10(b) instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders [have been] treated unfairly" ¹¹⁴ Thus, the *Mobil* court's concern for the fairness of the transaction to shareholders does not justify straining the established scope of the term "manipulation"¹¹⁵ to include management actions outside the securities markets, the facts of which are fully disclosed to investors.

B. Overly Broad Reading of the Williams Act

The *Mobil* approach takes the Williams Act a step beyond its intended purpose by interpreting the act as requiring an "equal opportunity to compete in the marketplace" for all interested bidders.¹¹⁶ Former Senator Williams, during the introduction of the bill, remarked that the Act would give "the offeror and management equal opportunity to fairly present their case."¹¹⁷ This remark should be construed, in light of the Act's general language, as a reference to the Act's goal of "full and fair disclosure" for the benefit of the investor.¹¹⁸ There is no indication in the legislative history of the Williams Act that Congress intended to give prospective tender offerors an absolute right to bid for control of another corporation.¹¹⁹

It has been suggested that the broad purpose of investor protection underlying the Williams Act¹²⁰ mandates that shareholders be given an opportunity to tender their shares, and if they are not given such an opportunity, then the right to discover the material facts of the trans-

113. 430 U.S. at 474.

114. *Id.* at 477.

115. See note 71 *supra*.

116. 669 F.2d at 376.

117. See 113 CONG. REC. 854, 855 (1967).

118. This remark was extracted from the following context:

The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management [an] equal opportunity to fairly present their case. Experience under the Securities Act of 1933 and the Securities Exchange Act of 1934 has amply demonstrated that the disclosure requirements of the Federal securities acts are an aid to legitimate business transactions, not a hindrance. *Id.* at 854-55.

119. "[T]ender offerors were not the intended beneficiaries of the [Williams Act]. . . ." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 28 (1977). "Th[e] express[ed] policy of neutrality scarcely suggests an intent to confer highly important, new rights upon [takeover bidders] whose activities prompted the [Williams Act] in the first instance." *Id.* at 30.

120. See SENATE REPORT, *supra* note 40, at 3.

action is illusory.”¹²¹ The legislative history of the Williams Act, however, evinces an intention by Congress to eliminate pressured, uninformed decision-making during a tender offer,¹²² and not an intention to ensure that investors get the highest possible bid for their share.¹²³ The general goal of protecting investors should not obfuscate the fact that Congress chose disclosure of information as the most desirable vehicle for achieving this goal. In addition, the goal of investor protection is not necessarily served by prohibiting or severely restricting target management’s ability to influence bidding.¹²⁴ Furthermore, the right of full disclosure should not be referred to as an illusory protection because such disclosure is likely to provide the basis for a state law claim of breach of fiduciary duty if management has wrongfully denied or impeded a tender offer opportunity solely to perpetuate its position.¹²⁵

V. Rejecting a Piecemeal Approach

By extending the meaning of manipulation to encompass acts which, though related to a securities transaction, are essentially breaches of fiduciary duty, the *Mobil* court has returned to the piecemeal development of a federal fiduciary standard found in the pre-*Santa Fe* decisions.¹²⁶ Although the *Mobil* court’s approach toward

121. See Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901, 911-12 (1979). [hereinafter cited as Lynch & Steinberg].

122. See notes 40-51 *supra* and accompanying text.

123. See note 41 *supra* and accompanying text. Even the court in *Mobil* admitted that its “task under the Williams Act [was] not to speculate about what price the Marathon shareholders might have been offered. . . .” 669 F.2d at 376.

124. See *Heit v. Baird*, 567 F.2d 1157 (1st Cir. 1977). The court in *Heit* held that target management’s issuance of corporate stock to a friendly party was “of a character which could be thought to serve the interests of the company.” *Id.* at 1161, citing *In Re Kaufman Mut. Fund Actions*, 479 F.2d 257, 275 (1st Cir.), *cert denied*, 414 U.S. 857 (1973). See also ARANOW & EINHORN, *supra* note 5, at 219, notes 129-30 *infra* and accompanying text.

125. See *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972). After full disclosure is obtained, the shareholders have a cause of action for self-dealing schemes and transactions in state courts under a theory of breach of fiduciary duty. Cf. CARY, CASES AND MATERIALS ON CORPORATIONS 1710-11 (4th ed. 1969). “Where the right to appraisal and payment for shares is the exclusive shareholder remedy under state law, the federal disclosure provisions are still not ‘nugatory.’ They will help ensure that shareholders have the information necessary for an intelligent exercise of their appraisal rights.” *Id.*

126. See note 55 *supra*. *Santa Fe* clearly overruled these decisions. “Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.” *Santa Fe*, 430 U.S. at 479.

defensive tactics is not supported by either the weight of judicial interpretation¹²⁷ or an analysis of legislative intent,¹²⁸ other courts may find that applying the *Mobil* approach is an expedient method of curbing corporate mismanagement in a tender offer through federal securities laws. Tender offer litigants have, in fact, already begun to rely upon the rationale of *Mobil* to attack defensive tactics as manipulative.¹²⁹ If the *Mobil* approach is followed, target management will find itself subject to a broad federal standard of conduct, as well as to established state law requirements used to determine the propriety of defensive tactics. This imposes an undue burden on the management of target companies because they must determine where the exercise of discretion under state law to oppose a tender offer ends and where the prohibition against deterring competitive bidding at the federal level begins. To avoid this conflict, courts should adhere to the present legislative refusal to create a federal corporation law.¹³⁰

A. In Search of a Standard

The determination of whether a takeover would be in the best interests of shareholders or the corporation, and the extent to which such efforts to gain control should be opposed are matters for management's business judgment.¹³¹ In judging the propriety of manage-

127. See note 60 *supra* and accompanying text.

128. See notes 18-51 *supra* accompanying text.

129. In *Whittaker Corp. v. Edgar*, No. 82-C-443 (N.D. Ill. Feb. 25, 1982), *aff'd*, Nos. 82-1305, 82-1307 (7th Cir. Mar. 5, 1982) (mem.), a tender offeror sought to enjoin an agreement, in which the target company had agreed to sell an important subsidiary to a third party, on the grounds that it operated as a lock-up arrangement aimed at thwarting the Whittaker tender offer in violation of § 14(e). Without rejecting the *Mobil* rationale outright, the district court attempted to narrow *Mobil*'s application strictly to its facts. The court held that "[the] sale of a substantial asset by a corporation in the face of a hostile tender offer standing alone is not a violation of section 14(e)." *Id.* No. 82-C-443 at 24.

130. Various proposals for federal incorporation have been made but none have been accepted. See Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972). See also S. 2567, 96th Cong., 2d Sess.; 126 CONG. REC. S3754-57 (Apr. 16, 1980) ("Protection of Shareholders' Rights Act of 1980"); H.R. 7010, 96th Cong., 2d Sess. ("The Corporate Democracy Act") (introduced at 126 CONG. REC. H2490 (Apr. 2, 1980)).

131. See *Panter v. Marshall Field & Co.*, 646 F.2d 271, 296 (7th Cir. 1981) (evaluation and response to tender offers are within director's duties); *Heit v. Baird*, 567 F.2d 1157, 1161 (1st Cir. 1978) (management has the right and the duty to resist by lawful means all attempts at gaining control which would be harmful to the corporation); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969) (management should be fair in considering tender offer proposals but may oppose such offers which in its best judgement are detrimental to the corporation).

ment's use of defensive tactics under state law, therefore, most courts apply the business judgment rule. Under the business judgment rule, management is granted "relatively wide discretion to act in what it considers to be the best interests of the corporation"¹³² in opposing a tender offer. Some courts, however, have applied stricter standards such as the "primary purpose"¹³³ approach and the "objective assessment" or "entire fairness" standard.¹³⁴ In addition, it has even been suggested that target management should be disqualified completely from opposing a tender offer under a standard of "passivity."¹³⁵ Another recommendation is the acceptance of a standard judging defensive tactics by the effect they have on a shareholder's opportunity to tender his shares.¹³⁶

The application, by some courts, of a stricter standard of conduct during a tender offer than the ordinarily applicable business judgment rule can be attributed to the recognition that a presumption of sound business judgment may be inappropriate given the inherent self-interest in target management's opposition to a takeover.¹³⁷ The courts which eschew the business judgment rule during a tender offer appear to apply the reasoning of cases that suspend the rule when there is an

132. *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978). *See, e.g.*, *Panter v. Marshall Field & Co.*, 646 F.2d at 293; *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 305 (D. Del. 1981). Under the business judgment rule, actions arguably taken for the benefit of the corporation are presumed to have been an exercise of sound business judgment. *Johnson v. Trueblood*, 629 F.2d 287, 293 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

133. *See, e.g.*, *Johnson v. Trueblood*, 629 F.2d 287, 292 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969); *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 362-63, 230 A.2d 769, 775-76 (1967). Courts use this standard to determine whether management's primary motive behind the takeover is improper. Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U.L. Rev. 403, 437 (1980) [hereinafter cited as Gelfond & Sebastian].

134. *See, e.g.*, *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234 (9th Cir. 1975) (there was a sufficiently compelling business justification to make management's transaction "fair" to minority shareholders). Under this approach, courts substitute their own view for what a reasonable director would have done when faced with the threat of a takeover. Gelfond & Sebastian, *supra* note 133, at 443-49.

135. This theory argues that shareholders' best interests would be served if management was required to be "passive" during a tender offer because opposition discourages bidders. Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

136. Lynch & Steinberg, *supra* note 121, at 924. This article suggests that tactics taken for the purpose of materially impeding or precluding a shareholder's right to tender should be considered illegitimate regardless of full compliance with disclosure requirements. Conversely, tactics that do not preclude or materially impede a shareholder's decision are to be considered legitimate even if their primary purpose is to defeat the bidder's offer.

137. *See* note 9 *supra*.

opportunity for self-dealing by management because in those instances the presumption of sound business judgment is rebutted.¹³⁸

If a federal fiduciary standard during tender offers is to be adopted, it should be determined whether or not the analogy to self-dealing transactions is justified.¹³⁹ In the meantime, ad hoc development of federal fiduciary standards will serve only to disrupt established state-created duties.¹⁴⁰ Courts should be aware that the lack of a consensus on which standards should apply suggests that difficult policy issues emerge when target management opposes a tender offer for control.

B. Shareholder and Public Welfare

A policy aimed at tightening the reins on management's use of defensive strategies implies an assumption that shareholder welfare will be maximized by management inaction. Defensive actions, however, often benefit shareholders by forcing prospective bidders to increase the bid price in order to compete with management's opposition.¹⁴¹ In addition, management may have a duty to consider the

138. See *Sinclair Oil Co. v. Levien*, 280 A.2d 717 (Del. 1971). In *Sinclair*, the court said that a test of intrinsic fairness would be applied when a fiduciary duty is accompanied by a self-dealing transaction. Under the intrinsic fairness test, the fiduciary is required to prove that his conduct was intrinsically fair to those who hold him in trust. The court held that the transaction involved did not constitute self-dealing and thus applied the business judgment rule. *Id.* at 720. A number of courts have substituted the intrinsic fairness test for the business judgment rule when a transaction is between a parent and a subsidiary, with the parent controlling the transaction. See *Bastian v. Bourns, Inc.*, 256 A.2d 680, 682 (Del. Ch. 1969), *aff'd*, 278 A.2d 467 (Del. 1970); *David J. Greene & Co. v. Dunhill Int'l, Inc.* 249 A.2d 427, 430 (Del. Ch. 1968); *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107 (Del. 1952). *Cf.* *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) (freezeout merger with a valid business purpose must meet the "entire fairness" test with respect to dissenting shareholders).

139. According to the court in *Johnson v. Trueblood*, 629 F.2d 287 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981), "[t]he business judgment rule seeks to alleviate the burden of certain directorial decisions which involve a conflict of interest by validating those decisions if arguably taken for the benefit of the corporation." *Id.* at 292.

140. For example, because some states require management to oppose a change in control where it is not in the best interests of the corporation, adoption of either a passivity standard or an impediment to shareholder opportunity approach could place management in a precarious situation in which it is unclear what standard applies to the circumstances.

141. It is not uncommon for the target management's opposition to cause an increased price bid. See, e.g., *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 367-69 (6th Cir. 1981), where Mobil increased its bid for Marathon shares from \$85 per share to \$126 per share after Marathon had solicited the aid of a white knight. In addition, management's grant of lock-up options as in *Mobil* may be necessary to induce reluctant bidders to enter the tender offer contest with a higher offer. See *Fraidin & Franco*, *supra* note 91, at 823. At least one court has stated that it is appropriate for a target's management to delay by litigation in order to buy time for negotiating a better deal. *Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp.*,

interests of non-shareholders, i.e., employees, customers, or the general public as well as those of its shareholders.¹⁴²

One of the most persuasive arguments militating against unnecessarily restricting target management during a tender offer is the unsettled debate over the long term economic effects of a takeover. Tender offers have been recognized as a legitimate device for replacing an unimaginative management with one that will develop the corporation's potential.¹⁴³ However, the principal targets do not appear to be sluggish companies but rather successful ones having poor shareholder communications and widely dispersed stock ownership.¹⁴⁴ Moreover, the acquiring company is often the one with a poor performance record.¹⁴⁵ It acquires the target company to boost its own lackluster performance. Takeovers may not promote efficiency as much as they encourage corporate growth.¹⁴⁶ As one commentator concluded, sizeable mergers tend to be followed by insignificant operational changes that make little contribution in enhancing efficiency or profitability of surviving companies.¹⁴⁷

394 F. Supp. 267, 274 n.1 (S.D.N.Y. 1975). Significant evidence exists to suggest that shareholders benefit in the long run from a rejected takeover bid. See Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 106-09 (1979). Of "36 unsolicited tender offers that were rejected and defeated by the target between the end of 1973 and June [of] 1979, shares of more than 50 percent of the targets are either today at a higher market price than the rejected offer price or were acquired . . . by another company at a higher price than the offer price." *Id.* at 106. A policy which prohibits management from interfering with takeover bids, merely because it prevents shareholders from realizing a premium above market price, is short-sighted. As one commentator has suggested, little difference exists between such a policy and a requirement that directors periodically determine whether sale or liquidation of the company would yield a substantial premium for shareholders over market price. *Id.* at 109.

142. See *Herald Co. v. Seawell*, 472 F.2d 1081, 1091, 1094-95 (10th Cir. 1972) (corporation publishing a newspaper has an obligation to employees and the public). The threat of a takeover can disrupt the target's operations and unsettle key employees. See *McGraw-Hill Bid Stirs Editorial Fears*, N.Y. Times, Jan. 14, 1979, at 51, col. 3. For a discussion of the debate as to whom corporate management owes a fiduciary duty, see generally Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964).

143. See 113 CONG. REC. 854, 854 (1967). "In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations it may be necessary if the company is to survive." (remarks of Senator Williams).

144. See Troubh, *Characteristics of Target Companies*, 32 BUS. LAW. 1301 (1977).

145. See ARANOW & EINHORN, *supra* note 4, at 219.

146. See Gelfond & Sebastian, *supra* note 133, at 454.

147. Scherer, Book Review, 86 YALE L.J. 974, 986-88 (1977), reviewing R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE*.

In light of the current emphasis by the federal government on increasing capital investment to stimulate the economy,¹⁴⁸ facilitation of acquisitions rather than the encouragement of new investment seems out of step with general economic policy. It has been proposed that firms which have accumulated cash should be encouraged to make new capital outlays in plant and research and development rather than encouraged to acquire existing businesses.¹⁴⁹

The resolution of these policy issues and a determination of the influence they should have in the development of a federal fiduciary standard is a responsibility that should be properly left with the legislature. In assessing the need for new congressional review of tender offer law, it is well to remember that the Williams Act was enacted over a decade ago when the use of the tender offer to gain corporate control was still in its relative infancy.¹⁴⁹ The Congress now has a wealth of empirical evidence on the effects of takeovers by tender offers with which to determine if additional regulation is needed in this area. In 1979, members of the Senate Banking Committee requested that the SEC review "the adequacy of existing law and policy" in a number of areas relating to tender offers.¹⁵⁰ The Commission submitted a proposed draft to amend the Williams Act in 1980.¹⁵¹ The proposed bill contains a provision that would impose liability on directors who do not exercise reasonable care in a tender offer situation.¹⁵² It is unclear whether this standard represents an acceptance of the generally followed business judgment rule or is intended as a new standard. Until Congress reviews these proposals in accordance with traditional legislative procedures of analysis, publicity and debate, courts should exercise restraint against "legislating" in this area.

148. See S. REP. NO. 97-144, 97th Cong., 1st Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS vol. 6, at 205-06.

149. Speech by Harold Williams Before the Seventh Annual Securities Regulation Institute (Jan. 17, 1980), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,445.

150. See *Report of the Securities and Exchange Comm. to the Senate Comm. on Banking, Housing, and Urban Affairs* 1 (1979) (letter to Harold M. Williams, Chairman SEC). "By comparison to the events we are witnessing today, the merger mania of the last decade, which led to the enactment of the Williams Act in 1968, was modest."

151. See Letter from Senators Proxmire, Williams, and Sarbanes requesting Securities and Exchange Commission views on tender offer laws (July 3, 1979), *reprinted in* Legislative Proposals on Tender Offers, Beneficial Ownership, Issuer Repurchases, 542 SEC. REG. & L. REP. (BNA) Spec. Supp. 3 (Feb. 27, 1980).

152. See Proposed Bill to Amend the Williams Act, *reprinted in* Legislative Proposals on Tender Offers, Beneficial Ownership, Issuer Repurchases, 542 SEC. REG. & L. REP. (BNA) Spec. Supp. 20 (Feb. 27, 1980).

VI. Conclusion

The Supreme Court has rejected as inconsistent with congressional intent attempts to extend federal securities laws to include a federal fiduciary standard of conduct. The expansion of the meaning of "manipulation" by the Sixth Circuit in *Mobil v. Marathon*, to include a target management's conduct which significantly deters competitive bidding during an unfriendly tender offer is unsupported by the 1934 Act, the Williams Act, or Supreme Court precedent. The inherent conflict of interest in a target management's opposition to a tender offer, however, may necessitate the substitution of the business judgment rule under state law with a stricter standard.

The adoption of a uniform federal standard of conduct which restricts management's discretion during a takeover attempt requires the consideration of important issues of public policy. Courts should exercise judicial restraint, therefore, until Congress has had the opportunity to balance through legislation the relative interests of the parties involved.

James P. Walker